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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. [redacted] 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 2, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court in entering summary judgment against the petitioner is reported at

1961 Trade Cases, Para. 69,936 and appears at Tr. 347-360.

The opinion of the District Court in denying petitioner's application for an injunction upon the original complaint, subsequently amended, is reported at 162 F. Supp. 746 and appears at Tr. 42-43.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 311 F. 2d 764 and is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 2, 1963 (R. 575, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether an ousted independent service station dealer has a cause of action against his lessor and supplier under Section 4 of the Clayton Act for damages resulting from its refusal to renew a one year lease because of the dealer's disobedience to price control orders made by the lessor and supplier pursuant to its scheme and plan to fix and control the retail price of gasoline as to 3,000 dealers located in 8 western states by means of a so-called "retail dealer consignment agreement" plan?

2. Whether an independent service station dealer whose gasoline prices were fixed by his lessor and supplier has a cause of action under Section 4 of the Clayton Act against it for damages resulting from the service station dealer's coerced adherence to the supplier's price fixing directions?

3. Whether major gasoline suppliers are liable under the antitrust laws for using a one year lease as a weapon to restrain the independent dealers' ability to sell at prices in accordance with their own judgment to those injured by the weapon or whether the federal courts are allowed to immunize them from liability on the ground of the assumed dealers' consent to be victims of such weapon?

4. Whether petitioner was erroneously deprived of a trial by jury in the light of this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)?

5. Is not respondent's consignment method of fixing resale prices of gasoline sold by some 3000 retail dealers, as enforced and policed by respondent, a per se violation of Seetions 1 and 2 of the Sherman Act?

6. Is not respondent's consignment method of fixing resale prices of gasoline in violation of the Sherman Act because it fixes retail prices of dealers after the risks of title have passed to them?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C., Section 15. These are printed and attached hereto as Appendix C. Federal Rule of Civil Procedure 56 is also printed and attached hereto in Appendix C.

STATEMENT OF THE CASE

A. Nature of the Case.

1. The Pleadings.

This is an action by a service station dealer who had leased a beautiful (Tr. 307) service station site from the respondent, Union Oil Company of California. The complaint was originally for injunctive relief to require respondent to continue to lease the property to petitioner (Tr. 3-36). Petitioner's application for a preliminary injunction was denied (Tr. 44), and petitioner amended his complaint to seek damages under section 4 of the Clayton Act (Tr. 44-45). The amended complaint demanded trial by jury (Tr. 46).

The amended complaint alleged that respondent was engaged in interstate trade and commerce in the production, refining and distribution of petroleum products in eight western states. The complaint alleged that respondent controls the operations of approximately 4,733 service station sites in these states (Tr. 46-59). It is alleged to have had a total volume of sales in 1957, of $436,731,000.00 and marketed 60,404,000 barrels of petroleum products in interstate and foreign trade and commerce (Tr. 49).

The complaint alleged that Union Oil Company acquires possessory interests in service station sites and leases these site to independent dealers, but only on a one-year basis and utilizes the short period of the lease to control the dealers' prices and gasoline purchases, because of the fear of non renewal (Tr. 49, 51, 52).

The complaint alleges that respondent has violated Sections 1 and 2 of the Sherman Act to the injury of petitioner. Petitioner claimed that respondent was in violation of the antitrust laws in the following basic ways: (1) in promulgating and enforcing a retail dealer consignment agreement which purports to allow respondent the right to keep title to gasoline delivered to independent dealers, and directly fix the price the dealer charges to the public (Tr. 51); (2) in adopting the means of requiring new lessees who desired leases from respondent to agree to sign the price-fixing consignment agreement as a condition of obtaining the lease (Tr. 51); (3) in adopting the means of promulgating only one-year leases and utilizing lease non-renewal on existing lessees who were forced, under the possibility of lease termination, to sign the agreement (*Id.*); (4) in requiring the dealers to purchase their requirements of gasolines and oil exclusively from respondent (Tr. 49, 51); (5) in adopting the means of establishing a policing system to make certain that the dealers are following the policies set by Union (Tr. 52); (6) in utilizing the means of ouster from the leased premises of those who refuse to comply with price directions (Tr. 51,

52); (7) in limiting the ability of the dealers to operate profitably by preventing lessees from obtaining good will or the fair market values of their business (Tr. 52); (8) in selling its gasoline to "off-brand" stations who set prices below the prices established by Union, which is known to Union, but who prevents the dealers from meeting this competition (Tr. 52-53); (9) in attempting to monopolize and actually monopolizing the distribution and retailing of gasoline by utilizing its position as a lessor and a supplier to control the retail business of thousands of otherwise independent service station lessees, and depriving them of profits and values that they would acquire but for the monopolization (Tr. 50-53).

The complaint detailed the facts with respect to petitioner's injury (Tr. 54-56).

In March, 1958, a major price disturbance occurred in the petitioner's competitive area (Tr. 55). Prices of regular gasoline were lowered by his competitors from 34.9¢ to 27.9¢ *(Id.)*. Petitioner desired to meet these prices (Tr. 55-56).

The petitioner requested authorization but respondent refused to allow the petitioner to lower his price to 27.9¢ (Id). Petitioner however persisted in meeting the competition and kept his prices at 27.9¢ (Tr. 56). Respondent's agents then demanded that petitioner raise his price to the level established by respondent (Tr. 56). Petitioner was told by respondent that he would be unable to obtain a lease renewal unless he abided by the respondent's price directions (Id). Petitioner persisted in his decision to stay at

the prices of his competition, and on April 21, 1958, he was notified that his lease would not be renewed (Tr. 56).

Petitioner left the premises on June 5, 1958 (Tr. 57).

Petitioner alleged he was compelled to accept the business arrangements offered by respondent (Tr. 57):

> "28. As a direct result of the illegal contracts and plan to monopolize the retailing of gasoline and oil products manufactured and distributed by Union, the plaintiff was compelled to accept a one year lease from the defendant Union, compelled to accept a consignment agreement directly fixing the prices of his gasoline, and compelled to remove himself from the premises on 4010 E. Ventura Avenue, Fresno, California, as of June 5, 1958. That had the plaintiff not been an errant lessee as aforesaid he would have obtained and continued to have obtained successive leases for said property from the defendant."

Petitioner then alleged two claims for damages: (1) He claimed $150,000.00, as a result of ouster from the service station property pursuant to an attempt to control and fix his retail prices (Tr. 57). (2) He claimed $1,000.00, as a result of being unable to fix the prices of his gasoline during the period, May, 1955, to March, 1958 (Tr. 57).

Before answer, the respondent made a motion to dismiss the amended complaint and for summary judgment (Tr. 59). The motion was denied without

prejudice (Tr. 87-88). An Answer was thereafter filed (Tr. 88-106).

The answer admitted petitioner was engaged in interstate commerce (Tr. 88-91). It admitted the promulgation of the retail dealer consignment agreements which gave it the purported right to control retail prices in eight western states (Tr. 91). It attached a copy of the petitioner's consignment agreement to the answer, as Exhibit A therein (Tr. 95-102). It admitted it entered into two one year leases with the petitioner (Tr. 92). It admitted that the authorized price to petitioner was 29.9¢ between February 28, 1958 and March 12, 1958 (Tr. 92). It admitted that petitioner sold regular gasoline at 27.9¢ (Tr. 92-93). It denied that petitioner had requested authorization for this price (Tr. 93). It admitted that it told petitioner he was violating the consignment agreement and that its agent visited petitioner's station and told petitioner that "he would do what he could to cause plaintiff to abide by the terms of the consignment agreement" (Tr. 93). The answer then admitted, at Tr. 93:

> "Answering paragraph 25, defendant alleges that following said conversation, plaintiff refused to comply with his obligations under the consignment agreement existing between the parties and persisted in selling defendant's gasoline at prices at variance with those authorized by defendant thereunder; admits that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant. Except as so admitted, defendant denies the averments of said paragraph 25."

The answer then asserted the affirmative defenses of a prior judgment of the Superior Court of the State of California, in and for the County of Fresno claimed to adjudicate defendant's right to possession of the service station after May 22, 1958 (Tr. 94). It also asserted the affirmative defense of pari delicto (Tr. 94).

2. Pre-trial Proceedings.

The district court ruled that petitioner's discovery should be allowed only after pre-trial conferences were requested (Tr. 106-108). Thereafter, the petitioner, in compliance with this order filed a motion for a pre-trial conference, a statement of issues and agenda, and a statement re damages (Tr. 179, 187, 189, 190, 196). Defendant below filed its statement of issues (Tr. 181-187).

The following thereafter occurred. The first pre-trial conference was heard April 30, 1959 (Tr. 368-392). At this pre-trial conference the District Court was of the view that the parties could stipulate to the basic facts and utilize the interlocutory appeal provisions of the federal rules in order to determine the lawfulness of respondent's retail-dealer consignment program (Tr. 373, 377, 378, 386, 389). The conference ended with the request of the Court that basic facts should be stipulated and that there be a certification of the issues of law based on the stipulated facts as to violation of the antitrust laws (Tr. 391). The stipulations and contentions of Union Oil at the pre-trial conference were that it tied the retail-dealer consign-

ment agreement to the granting of the one year lease (Tr. 380, 387) and that it had the right to refuse to renew leases of those who refused to abide by its authorized retail prices (Tr. 387-388).

A second pre-trial conference was held May 21, 1959 (Tr. 392-407). At this pre-trial conference the parties were unable to agree to stipulations as to undisputed facts. The District Court, upon the contentions of respondent's counsel, that respondent could lawfully, under the Sherman Act, grant only one year leases and then refuse to renew the leases of all those who did not abide by authorized prices, was of the view that respondent was willing to concede the basic issues in the case (Tr. 395-396). It was of the view that petitioner should file a pre-trial statement for a pre-trial ruling on the issue of violation (Tr. 399, 403-406). The statement of respondent's counsel raising this matter was as follows (Tr. 401):

> "The Court. Mr. Lasky, isn't it your contention that even if you do cancel everybody that has a one-year lease and who violates the consignment agreement that you are still entitled to summary judgment?
>
> Mr. Lasky. [Counsel for respondent] Yes."

At Tr. 402:

> "Mr. Keith. [Counsel for petitioner] You specifically said on this issue that you felt it would be legal if the company would refuse to allow a lessee renewal of his lease if he didn't sign the consignment agreement, is that correct?
>
> Mr. Lasky. Yes; I said that. That is my theory. And I also said that even if it were true that

we had refused to renew four or five others for like reasons, it wouldn't make any difference. I said that".

Thereafter, counsel for petitioner filed a pre-trial statement for a pre-trial ruling (Tr. 199-210). Attached to this statement were letters sent by respondent's Sales Manager, Dealer Sales, to the division offices explaining or giving instructions on the retail-dealer-consignment program (Tr. 210-298). The plaintiff's pre-trial statement did not waive trial by jury (Tr. 199).

The defendant below was to move for a pre-trial ruling on this statement, but it did not do so (Tr. 399, 406). Instead it noticed the deposition of the petitioner. Portions of the deposition of petitioner appear in two places, at Tr. 452-493, Tr. 300-329.

Following the deposition, respondent again moved for summary judgment (Tr. 298). The motion was on all issues (Id). At the arguments on the motion (Tr. 407-436), the District Court was again of the opinion that, based on the extensive stipulations of counsel for respondent, issues could be and should be decided by the appellate courts (Tr. 413, 426-427, 435). The Court was of the view that petitioner should file a motion for partial summary judgment on the issue of violation of the antitrust laws (Tr. 426).

The respondent made extensive stipulations at this proceeding at Tr. 409, 415-419, 429.

Subsequent to the motion of defendant for summary judgment, petitioner then filed a motion for

partial summary judgment on the issue of violation of the antitrust laws (Tr. 337). The motion expressly did not waive petitioner's right to trial by jury (Tr. 338). An extensive memorandum in support of the motion for partial summary judgment was filed by petitioner, and its table of contents appears at Tr. 339-343. Following argument on the petitioner's motion (see Tr. 436-441), the District Court ruled in favor of the respondent on all issues and filed an opinion (Tr. 347-360). Judgment was then entered for the respondent (Tr. 360-361). Petitioner entered objections to the entry of judgment (Tr. 361-366).

3. The Undisputed Record in Summary Judgment as to Violations of the Antitrust Laws.

The record thus contains sweeping stipulations by respondent or admissions contained in policy letters or in papers filed by respondent as to the purposes, means used, and effect of its retail dealer consignment agreement scheme (See Tr. 427-428). These may be summarized as follows:

1. The Union Oil Company holds primary possession to 2,003 service stations in the states of California, Washington, Oregon, Nevada, Arizona, Montana, Utah, Idaho (Tr. 333).

2. The Union Oil Company has gasoline supply agreements with an additional 2,116 dealers who either own the outlets or lease them from third parties (*Id.*).

3. The gallonage delivered to the lessee dealers in 1957 was approximately 427,000,000 gallons, and to non-lessees was 90,000,000 gallons (Tr. 334). The total

dollar volume of sales of refined petroleum products in 1957 by respondent was $347,900,000. (Tr. 210).

4. Union Oil Company sold approximately 11.5% of all gasoline sold in the State of California (Tr. 38).

5. At all times, Union Oil Company has sought to lease out to independent businessmen (Tr. 91) its service station sites under a one year lease which requires the lessee to pay rent to Union Oil Company and assume all the risks of the enterprise (Tr. 19-27). The lease of petitioner required the station to be open as much as 16 hours a day (Tr. 23).

6. Union Oil Company would only issue the one year lease (Tr. 214, 395).

7. Prior to 1955 Union did not have consignment agreements (Tr. 91, 343-345).

8. About December, 1954, Union Oil Co. decided to control the retail price of dealers "when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level" (Tr. 223-224). The method used to accomplish this was the Retail Dealer Consignment Agreement (Tr. 223, 224, 224-230). As to this agreement, it was stated:

> "This agreement temporarily suspends our normal buy and sell arrangements on gasoline, making the dealer our agent for the sale of gasoline consigned to his storage.
>
> We will pay commissions of 4½¢ per gallon on 76 Gasoline and 5½¢ per gallon on 7600 Gasoline, regardless of the selling price fixed by us. These

consignment agreements will not alter our rental arrangements; any rental being due from Lessees to Union Oil Company being payable out of the consignment margin. The use of this program must be first approved by Head Office covering each area and it is to be invoked only under extreme conditions" (At Tr. 223-224).

On or about March 10, 1955 it was decided not to make retail dealer consignment a temporary arrangement but to make it permanent. The instructions were that it was to be used when (Tr. 233):

"... when the competitive price condition in certain neighborhoods require a change in our retail selling price, then this plan is adopted for a given trading area, which will comprise all of the area within a marketing station boundary (with the exception of those metropolitan areas divided into economic trading zones), it will be offered to all dealers within the nominated area."

The prices nominated by Union at such time were to be 3¢ over major competition and 2¢ over regular competition (Tr. 231-232). Such price changes were to be made by the hour to follow competitors, but after the "cut price situations cleans up" the prices were then to equal or be above "our former fair traded price . . ." (Tr. 232).

9. The retail dealer consignment agreement is a gasoline products delivery agreement by which the dealer must maintain the trade marks of Union on his pumps and other facilities through which gasolines are dispensed (Tr. 95). It states that Consignor will

agree to deliver and Consignee will receive such quantities of Consignor's gasoline as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business (Tr. 95). Respondent's counsel has stipulated that Union Oil Company will not do business with anyone who violates the terms of the agreement (Tr. 379-380; 401-402; 417-419). The dealer could not under respondent's consignment arrangement repaint the whole station and dispense another company's gasolines at his station without ouster (*Id.*, Tr. 434-435).

10. The retail dealer consignment agreement purports to reserve title to the gasoline in respondent and to allow respondent the right to require the consignee to "sell Consignor's gasolines at prices from time to time specifically authorized by Consignor in writing" (Tr. 95).

a. The risks of operation, storage, loss, evaporation, taxes and handling charges are on the dealer (Tr. 95-98). The one exception is loss from a natural catastrophe (Tr. 97-98).

b. Consignor agrees to pay property taxes on stored gasoline (Tr. 100).

c. Consignor purported to agree to pay a minimum commission to the dealer (Tr. 99-100), and to allow the dealer the difference between the sales price and the wholesale tank-wagon price as commission (Tr. 99). But the record showed the respondent refused to guarantee the commission. On the contrary respondent felt it would do as it pleased with the dealer's commission.

In February, 1958, respondent determined to do away with the guaranteed minimum commission (Tr. 285). Instead the dealer was given a letter which purported to allow a minimum commission, but the letter gave respondent the right to revoke its provisions at any time by written notice (Tr. 287-288). Under the new arrangement the dealer was to absorb 20% of any reduction between authorized retail price and normal retail (Tr. 285). Normal retail was "$.045 per gallon over Union's Dealer Sales Posted tank wagon price for both Royal 76 Gasoline and 76 Gasoline" (Tr. 282).

This change in commissions was to be effectuated as follows (Tr. 286):

> "3. You will review the consignment agreements of those dealers who refuse to sign a mutual cancellation of such agreement and you will serve a thirty-day notice of cancellation at the applicable time. After such cancellation you will sign the dealer to the new consignment agreement and give him Letter No. 1 which will be effective as previously stated. It is imperative that you do not miss a cancellation date because by doing so you could delay the effective date of this new commission policy by one year."

On April 15, 1958, the respondent again changed its commission schedules (Tr. 70-85). The consignee was to absorb changes in the retail prices by a sliding scale which provided for dealer absorption of 20% of any reduction in price below normal retail (Tr. 82-85). The instructions of respondent continued to be "There

will no longer be minimum commissions shown in the Consignment Agreement" (Tr. 76). Again, the respondent reserved the right to terminate the commission at any time by written notice (Tr. 79). The change in the consignment agreement was to be accomplished as follows (Tr. 77-78):

> "1. New dealers will be signed to the new agreement and concurrently therewith they will be given the special letter which will be effective until all retail consignees in a specified geographical area are signed to the new Consignment Agreement.
>
> 2. Our present dealers will be urged to sign the new Consignment Agreement immediately and concurrently therewith we will give them the special letter which will be effective as set forth for new dealers.
>
> 3. A thirty day notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give the special letter which will be effective as previously set forth herein."

d. The record showed that the dealers paid respondent for the gasoline at the time of delivery for the delivered gasoline (Tr. 170-171, Tr. 80). The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied (Tr. 311). Thereafter the dealer paid respondent when the gasoline was delivered to him (Tr. 170-171, Tr. 80).

The dealer pays the respondent the authorized price for gasoline, less his commission, but his commissions are dependent on the difference between the wholesale tank-wagon price and the authorized or minimum retail price (Tr. 99-100). When authorized prices were lowered by the respondent to a point below respondent's posted minimum price, the dealer thus absorbed 50% of the difference (Tr. 100).

e. The agreement runs from year to year until cancelled by either party on thirty day notice after the end of the initial term or at consignee's loss of right to occupancy of the premises (Tr. 101).

11. The purpose of the retail dealer agreement was, among other things, to control retail sales price (Tr. 415; 429).

12. The consignment agreement program was used to fix uniform and non competitive prices in the western states. At times the prices authorized were to be established by what Standard Stations, Inc. charged (Tr. 223, 231-232; 246-248; 256; 281-288; 70-86). The dealers' prices "were to equal predominant competitive major prices or Standard Stations, Inc. prices if latter are lower" (Tr. 283, 75). The dealer could not match the off brand dealer's prices, if desired (Tr. 281-288; 70-86).

13. The authorized consignment agreement prices ordered by respondent on the dealers were to be policed by Union personnel. On April 7, 1955, the General Sales Manager, Dealer Sales, wrote his division officers, as follows (Tr. 247-248):

> "We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Rep and the Sales Manager are carefully policing the establishment of a new nominated price for any service station so that they know it conforms with our instructions as outlined above."

Authorized prices were established by four methods: by price authorization letters (Tr. 273); by telephone calls, by visits to the station of the agents of the respondent and by the gasoline delivery ticket given at the time of delivery of the gasoline to the dealer (Tr. 489).

14. In order for the independent business man to lease a service station property from Union Oil Co. he had to agree to sign the retail dealer consignment agreement. This is stipulated (Tr. 417-418). The dealer "either takes the package deal or he doesn't take the gasoline station" (*Id.*). In the words of respondent's counsel, "either he took our consignment contract and our lease or we wouldn't deal with him" (Tr. 380). By the fall of 1956, the respondent determined to have a 100% consignment program (Tr. 277-278). The company's instructions were as follows, Tr. 278:

> "Our attempt has been to strenuously solicit the change over from the products contract to consignee agreements and this effort must be continued and accelerated as we expect that in the

near future we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business.

In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two party deal or 'other' and the only paper we will write is a one-year consignment agreement."

15. The one year leases of the respondent would not be renewed with a dealer who refused to follow the price fixing directions of the respondent. This is stipulated (Tr. 409; 401; 429; 417-419).

16. The policy of the respondent, however, is to renew the one year lease on a continual basis with all those who do follow Union's policies (Tr. 441, 450-452).

17. It is stipulated that the respondent refused to renew petitioner's lease because he violated the price fixing orders of the respondent and persisted in attempting to establish retail prices of his own judgment (Tr. 409; and see Tr. 299).

18. By 1957 the respondent had achieved virtually 100% control of the prices of the lessee dealers and non-lessee dealers (Tr. 334).

Out of a total of 2,003 lessee dealers in 8 western states, 1,978 were on retail price fixing consignment (Tr. 334).

Out of a total of 2,116 non-lessee dealers, 1,327 were on retail price fixing consignment (*Id.*).

19. The effect of the retail dealer consignment agreement was to eliminate competitive gasolines from the stations controlled by independent businessmen but under a consignment agreement with Union. In 1957 respondent sold a total of 392,000,000 gallons of gasoline in the State of California to 2,365 stations (Tr. 334). At 2,364 stations there were no other gasolines dispensed (Tr. 336-337).

20. The retail price fixing program of respondent was carried out despite the fact that it owned service stations itself (Tr. 333), operated a chain of off brand service stations in the State of California, known as Westways (Tr. 446-449); and distributes thousands of gallons of gasoline to off brand companies (Tr. 335-336) who retail gasolines at prices below the authorized prices of Union (Tr. 494, 508; Tr. 527, 532; Tr. 539, 545).

The deposition of the Sunland representative disclosed that respondent's agent in Fresno had a conversation with the Sunland official about the price war in the area of petitioner's service site at 4010 E. Ventura Ave., Fresno, California in 1958 (Tr. 516). The representative testified that all the oil companies were "working" to bring the price back up (Tr. 517, 518).

4. The Record as to "Consent" of the Petitioner.

The record shows the following testimony by petitioner in his depositions.

(1) At the time of the signing of the one-year lease in May, 1956, and the retail-dealer-consignment agreement, petitioner said, "Do I have to sign this . . . knowing that I had to . . . " (Tr. 309).

(2) At the time of the expiration of the first one year lease, around May, 1957, petitioner protested the consignment agreement (Tr. 475). Petitioner specifically testified that he "didn't want it" (Tr. 475). As far as Union's representative was concerned petitioner had to be on consignment (Tr. 475).

(3) Petitioner requested that he be allowed to become a purchase and sale dealer (Tr. 475).

(4) Petitioner constantly protested the margins he was receiving (Tr. 461, 462, 469).

(5) Petitioner desired to set his own prices at all times (Tr. 316).

(6) Petitioner kept his retail prices at the level of his competitors in March, 1958, despite demands by Union that he abide by its price directions. The Union representative told petitioner (Tr. 485):

> "I refused to put the price back up, and he said that he was going to call Los Angeles, and Mr. Rath and do everything in his power to force me to put the price back up . . . "

(7) Petitioner protested the lease ouster and did all he could to maintain himself as a lessee. Between the time of his notification of lease cancellation, on April 21, 1958, and the filing of his complaint for injunctive relief on May 21, 1958, petitioner attempted to obtain a change in respondent's determination to oust him by urging public support for his position

(Tr. 37-42). He solicited letters to be sent to the Chairman of the Board of Union Oil Co. (*Id.*). Respondent received 230 letters supporting petitioner's ability and position (Tr. 39).

Respondent, however, refused to change its position and dispatched its General Sales Manager, Dealer Sales (Tr. 37), Mr. Rath to visit petitioner, to warn him not to oppose Union. Petitioner testified he was told as follows, Tr. 479-480:

> "Q. And what did you say to Mr. Rath and what did he say to you?
>
> A. I don't recall the exact words at all, but he came there that day. He had to come around about 4:00 o'clock to get in the place, because it was impossible to get—to come in the front way, and he remarked that they had me pretty well blocked off. They even had saw horses across the street that he came down, and after pleasantries, he wanted to know how I was; he said that he heard that I had planned not to leave the service station when my lease was up, and I said, well, I didn't know where he had heard it, but he said, 'Well, you are going to have to leave.' I said, well—I said very little. As a matter of fact, Mr. Rath did most of the talking, but I recall that he told me about two dealers down in Los Angeles that had refused to leave, and he said that they had thrown them out bodily, and he said that he, through his past associations and knowing me, didn't want to see me get hurt. And he also said that the Union Oil Company had a lot more money than I did, and that it was foolish for me to try to sue them or anything, because I didn't have the money. And he said, 'You are going to go out when your lease is up, within the hour," as I recall, or words to that effect. Immediately,

anyway. And I said, 'Well, maybe so, but you had better keep it legal.' And he said, 'Whether we do or not, you are going to go out.' So that is mainly what I remember about the last conversation."

Petitioner was specifically told by respondent that if he did conform to authorized prices it would be recommended that his lease would be renewed (Tr. 491-492).

The lease of the petitioner provided he was to keep the business open 16 hours a day, every day of the week (Tr. 29, 31-32). Petitioner worked this time entirely by himself with only 14 days off work in the two years (Tr. 40, 67).

Following his ouster he leased a Mobil service station on July 3, 1958 (Tr. 321). He went into partnership with another person, thus reducing his income by one-half of that shown at Tr. 323.

5. The Opinion Below.

The Court of Appeals did not reach the issue of violations of the antitrust laws, but assumed such violations. It ruled on the issue of whether or not petitioner had actionable damages under the Clayton Act. It ruled that it was proper for an appellate court to classify the dealers of the respondent to determine whether or not there were categories of dealers who could not claim damages for forced ouster and the destruction of their free choice in prices and products. It found such distinction between dealers who knew that there would be a consignment agreement to be signed when they sought the leases of the service sta-

tion sites offered by Union Oil Co. and the dealers who were already on the service stations sites when it was proposed that they become consignees. It held that a dealer in the former classification had no actionable damages since "He had freedom to accept or reject the tendered lease and consignment agreement" (p. 8). It placed petitioner in this category although his ouster was made after the parties had entered into a separate and new lease in May, 1957 and his ouster followed his occupancy under the second lease. It applied the tort doctrine of "consent," Restatement of Torts, Sec. 892, to a private antitrust action by one claiming to have been coerced into accepting a price fixing agreement as a condition to obtaining lease occupancy and to one who was ousted after his determination to fix prices in accordance with his own judgment against the threats of the respondent that he could obtain lease renewals only if he abided by its price fixing directions.

It ruled as to each of petitioner's damage claims, holding they were thus not actionable. As to the damages claimed for the loss of his business he had spent sixteen hours a day for two years to build up, the Court ruled that petitioner came to Union with his eyes wide open that his prices were to be fixed which prevented recovery. As to the claim for damages as a result of being unable to fix prices in accordance with his own judgment while conducting his business, the Court ruled that there was no "inability" to fix prices at his desired levels since he was free to fix prices even though the risk was that he would be unable to obtain lease extensions.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT AND THE PURPOSES OF CONGRESS IN ENACTING SECTION 4 OF THE CLAYTON ACT TO PROTECT VICTIMS OF FORBIDDEN CONDUCT IN VIOLATION OF THE SHERMAN ACT.

A. A Record Showing Coerced Tie-ins, Threats of Ouster Unless Prices Are Followed, Actual Ouster Because of the Exercise of Free Judgments; All Shown to Be Part of a Scheme to Control Retail Prices of 3000 Dealers, Absolutely Precludes the Doctrine of Consent. There Is No Free Consent When Coercion Is Used by a Supplier, and the Act Protects the Victims of Coercion. There Is No "Ability" to Fix Prices Under Congressional Concepts of Industrial Freedom When the Alternative to the Exercise of Free Judgment Is Loss of Your Business. The Power to Lease Is Not the Power to Coerce Price Uniformity and Preclude the Public From Price Competition in Eight Western States.

1. The Sherman Act Prohibits the Use of Coercion to Obtain "Consent" Which Restrains the Freedom of the Trader to Sell in Accordance With His Own Judgment.

It is respectfully submitted that the doctrine of "consent" has no place in the judicial enforcement of the private antitrust action. A cause of action under Section 4 of the Clayton Act is established upon the proof of injury resulting from anything forbidden in the antitrust laws. This Court has held that the plaintiff's "claim need only be tested under the Sherman Act's prohibition on unreasonable restraint of trade, and meet the requirement that petitioner has thereby suffered injury" *Radovich v. National Football League,* 352 U.S. 445 (1957) at 453.

Congress has in the Sherman Act, it is respectfully urged, legislated an "anti-consent" statute. Thus one

of the objects of the Congress in the antitrust laws is to prohibit those with industrial power from using their power to obtain the consent of traders to the restraint of trade and their injury. The basic principle is set forth in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958). The Sherman Act protects the freedom of traders to sell in accordance with their own judgment.

Thus the Congress prohibits obtaining the trader's consent by coercive means. Examination of antitrust violations will usually involve the use of coercive power to defeat Congressional policies of free trade. It is respectfully submitted that the doctrine of "consent" is as inapplicable to the Sherman Act as it would be to statutes aimed at abolishing the doctrine of assumption of risk in federal workmen safety acts.

A party who has suffered injury as a result of forbidden practices may thus obtain damages as a matter of Congressional determination to keep the channels of interstate commerce free from obstructive conduct. The plaintiff's knowledge or lack of knowledge of defendant's violation of the antitrust laws would, it is respectfully submitted, be irrelevant to this Congressional purpose. The concern of the Courts, it is urged, is to determine whether or not the private plaintiff was a victim of forbidden practices which crippled his freedom of judgment. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1945).

2. The Decisions of This Court and the Circuit Courts have Consistently Allowed Private Antitrust Actions for (a) Damages Based on Extensive Injuries Suffered From the Cancellation of Business Relations Pursuant to Unlawful Plans or Schemes or Objectives Despite Contractual Provisions and (b) Damages Based on Injuries Arising From the Use of Economic Coercion to Require the Independent Business Man to Forego Free Judgments as to Prices and Products.

The action of petitioner is based on the attempt by respondent to unsuccessfully obtain petitioner's consent. Petitioner was threatened with lease ouster unless he followed price directions, and upon the exercise of his independent judgment, he suffered the consequences. To deny a cause of action arising from the enforcement of a coercive price fixing program would appear to be in direct conflict with the decisions of this Court. The cancellations of business relations pursuant to an illegal scheme to fix and control prices or obtain control of the market subjects the violators to treble damage actions.

Ramsay v. Associated Bill Posters, 260 U.S. 501 (1923); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951); *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962); *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558 (1951); see *United States v. General Motors Corp.* (7th Cir. 1941) 121 F.2d 376. See also *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594 at 625.

The denial of both damage claims here is in conflict with *United States v. Richfield Oil Co.,* 343 U.S. 922 (1952), affirming per curiam, (D.C. So. Cal.,

1951) 99 F. Supp. 280, and those cases which allow an action under Section 4 of the Clayton Act based on the utilization of coercion to interfere with free judgments as to prices and products. Clearly the Court below is in error in not holding economic coercion actionable on the part of the victim. *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U.S. 390 (1906); *Thompsen v. Cayser,* 243 U.S. 66 (1917); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555 (1931); *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947); *Eastman Kodak Co. v. Southern Photo. Materials Co.,* 273 U.S. 359 (1927); *Ring v. Spina* (2nd Cir. 1945) 148 F.2d 647; *Jewel Tea Co. v. Local Union's, etc.* (7th Cir., 1960) 274 F.2d 217; *Hartford Empire Co. v. Glenshaw Glass Co.* (W.D. Pa. 1942) 47 F. Supp. 711; *Allgair v. Glenmore Distilleries Co.* (S.D. N.Y. 1950) 91 F. Supp. 93, 96.

The common law has always recognized the distinction between those in pari delicto and those whose consent has been obtained by coercion. 12 Am. Jur., Contracts, Sections 217-219, pp. 734-737.

The learned Court below, in allowing lease ouster to be used as a weapon by respondent without liability, is in conflict with the decisions of other circuit courts which apply this distinction. As the Second Circuit stated in *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647 at 652:

> "Thus, it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dis-

missal. Victor Talking Machine Co. v. Kemeny, 3 Cir., 271 F. 810, Straus v. Victor Talking Machine Co., 2 Cir., 297 F. 791; Connecticut Importing Co. v. Continental Distilling Corp. v. Connecticut Importing Co., 2 Cir., 129 F. 2d 651, certiorari denied . . ."

See especially *A. C. Becken Co. v. Gemex Corporation* (7th Cir., 1959) 272 F. 2d 1; *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F. 2d 832, cert. denied 366 U.S. 963 (1961), discussed below.

The Restatement of Torts, Sec. 892, used by the Court below applies to consent only when "freely" manifested. Restatement, Sec. 892, excepts from the doctrine of consent those instances where duress has been applied. (See also Restatement of Contracts, Sec. 492). Yet duress as it relates to property interests is not limited to fear of bodily injury, but may be applied to cases in which threats of unlawful conduct directed against the other "deprives the other of a freedom of choice." (Id, at Sec. 871, comment f, pp. 419-421).

Further, the Restatement of Torts specifically states that that "consent" cannot be applied to those who are the subject of statutory protection. (Restatement of Torts, Sec. 892, p. 490).

B. The Action Below Involves Practices Engaged in to Restrain Free Judgments as to Prices and Products.

1. The Violations of the Antitrust Laws by Respondent Show Coercion as a Matter of Law.

The respondent below invites the small business man to lease its properties, pay it rent or enter into

gasoline supply contracts with it. It is respectfully urged that the action below involves purposes, means and effects which are in violation of the antitrust laws precisely because respondent denied free choice or free consent. These violations may be summarized as follows:

1. The means used by respondent to effectuate the retailer-dealer consignment agreement program are illegal per se under Section 1 of the Sherman Act, regardless of the validity of the consignment agreement and whether or not there has been an attempt to monopolize:

(a) The use of threats of lease ouster unless price-fixing directions are followed applied to independent dealers to control their free choice of prices, is in violation of the Sherman Act. *United States v. Richfield Oil Co.*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280; *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beach-Nut Packing Co.*, 257 U.S. 441 (1922).

(b) The actual cancellation of leases or other agreements with independent dealers because they refuse to abide by the terms of a price-fixing scheme used to control the free exercise of judgment as to prices charged the public is in violation of the Sherman Act. *United States v. Richfield Oil Co.*, supra; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *United States v. Parke, Davis and Company*, supra; *Kiefer-Stewart*

Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

Judge Yankwich held in *United States v. Richfield Oil Co.* (1952) that lease ouster could not be a means to effectuate agreements in restraint of trade on independent dealers. The question to Judge Yankwich was, 99 F. Supp. at 290:

> "So we come to the question: Is the independence, both legal and factual, created by the lease destroyed by the oral agreements and conditions superimposed by Richfield and which binds the lessee to the distribution of Richfield petroleum products and Richfield sponsored TBA products under penalty rigidly enforced—as the record shows,—of ouster unceremonious on 24-hours' notice, sometimes effected between sundown and sunup of successive days?"

The answer was set forth in the conclusions of law, as follows, 99 F. Supp. at 297:

> "(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessees of L-O stations illegal restrictions as to the types of petroleum and sponsored TBA products to be handled on the premises."
>
> "(6) Richfield should be prohibited from using the 24-hours' termination clause at all to enforce its restrictive conditions as to the products sold on the premises."

The use of threats by Richfield to cancel all agreements with the master dealers who held leases or ownership of their property independent of Richfield

was labeled "coercion" by Judge Yankwich, 99 F. Supp. 295-296.

This Court has held that a corporation could announce to the trade its resale price policies and refuse to do business with those considered opposed to the policies. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960). This is limited to a simple announcement to the trade of the manufacturer's price policies and a simple refusal to sell. But here respondent not only refused to sell gasoline; it refused to allow petitioner an opportunity to carry on his business as a lessee of the property at 4010 E. Ventura Ave., Fresno, California, after threats that unless he conformed he would be ousted (Tr. 485). This ouster was to make petitioner a conspicuous example to all dealers. This is beyond the limited dispensation of *Parke, Davis*.

(c) The respondent tied the gasoline products consignment agreement to the lease, thus coercing judgments at the inception of the enterprise in violation of the Sherman Act. *United States v. Richfield Oil Co.*, supra; *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Loew's, Inc. v. United States*, 371 U.S. 38 (1962).

In *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953) the Court stated, as pointed out in the *Northern Pacific* decision, at 605:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of the buyers' independent judgment as to

the 'tied' product's merits and insulates it from the competitive stresses of the open market." (Emphasis added.)

(d) The use of a strict price-compliance program involving the policing of prices, the reporting of errant dealers and the cancellation of business arrangements with those errant dealers, is unlawful under the Sherman Act. *United States v. Parke, Davis and Company*, supra; *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *American Tobacco Co. v. United States* (6th Cir., 1944) 147 F. 2d 93 at 113, affirmed, 328 U.S. 781 (1946); See also *Emich v. General Motors Corp.*, 340 U.S. 558 (1951); *United States v. General Motors Corp.* (7th Cir., 1941) 121 F. 2d 376.

The system used by respondent "necessarily constrains the trader." *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 at 454 (1922).

2. The driving out of the service station properties worthy men who have spent years and invested thousands of dollars to obtain a business is within the purposes of Congress as condemned conduct when the result of unlawful schemes. *United States v. Richfield Oil Co.*, supra; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941) *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962); *Radovich v. National Football League, et al.*, 352 U.S. 445 (1957).

The recent decision of this Court in *Federal Trade Commission v. Sun Oil Co.*, ____ U.S. ____ (1963)

specifically protects the independent dealers from discriminatory conduct engaged in by their suppliers under the antitrust laws.

3. The respondent has violated the Sherman Act because its purpose was to fix and maintain noncompetitive prices among three thousand dealers in interstate trade and commerce, and it used consignment as a guise to fix the amount the consumer shall pay, eliminating all competitions and enforced by the above means. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. General Electric Co.*, 272 U.S. 476 (1926).

4. The respondent has violated Section 2 of the Sherman Act because it has attempted to monopolize the interstate retailing of petroleum products at 3000 retail facilities in eight western states by controlling the prices, products and profits of these independent dealers. A violation of Section 2 of the Sherman Act occurs when one with the power to do so embarks on a plan or scheme to control an appreciable segment of interstate trade and commerce. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The attempted monopolization was 100% successful here. Within two years respondent had acquired control over the prices and gasoline products of 3305 dealers out of a total of 4119 (Tr. 332-334). Such a segment of

commerce constitutes a separate monopolization. Thus in *Standard Oil and Standard Stations, Inc. v. United States,* 337 U.S. 293 (1949) this court held that the control of the purchases of 6000 independent dealers constituting 16% of all outlets in seven western states (337 U.S. at 295) involving $58,000,000.00 of gasoline was in substantial lessening of competition or tending to create a monopoly under the terms of Section 3 of the Clayton Act, 15 U.S.C. § 14.

This action involved price as well as gasoline product control at approximately 3300 outlets involving a total of approximately 500,000,000 gallons of gasoline in eight western states (Tr. 332-334).

Predatory weapons were used to obtain this control as has been seen. Courts have held that the control of price judgments of all dealers inevitably results in the concentration of business in the hands of the few and may also result in the giving to a single corporation such a unification of interest or management as to constitute illegal monopoly. *American Tobacco Co. v. United States* (6 Cir., 1944) 147 F. 2d 93 at 113, citing *United States v. Eastman Kodak,* 226 Fed. 62, 77, 78. In *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922), this Court held that the control of the prices of the retailers there by the supplier was within the provisions of the Federal Trade Commission Act's prohibitions because "of its dangerous tendency unduly to hinder competition or create a monopoly," 257 U.S. at 454.

Even if the 100% control of 3300 independent outlets by predatory means is not deemed actual mono-

polization, the power such control allows respondent, together with the showing that predatory means have been used to obtain it, is a showing to the Court that a plan is underway to obtain control over entry into distribution and retailing of gasoline products by one controlling 11.5% of the gasoline sales in the State of California with a half a billion in assets (Tr. 211, Tr. 38). As such the courts are to nip the plan in the bud. *United States v. Aluminum Co. of America* (2nd Cir., 1945) 148 F. 2d 416 at 431-432. *Klor's, Inc. v. Broadway-Hale Stores, Inc.* 359 U.S. 207 (1959).

5. Regardless of the purposes of the respondent it has restrained freedom of trade in violation of Sections 1 and 2 of the Sherman Act because the effect has been to place in the channels of interstate trade, 3300 price-fixing agreements and exclusive gasoline-supply agreements which deprive the public of competition and the dealers of a competitive market. The effect has been shown to be the fixing of non-competitive prices and to shut out the market to competitive suppliers. *United States v. Masonite Corp.*, 316 U.S. 268 (1942); *Standard Oil of California v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Co.*, 343 U.S. 922, affirming per curiam, 99 F. Supp. 280.

Clearly, the free judgment of the service station dealer has been restrained as follows: (1) the dealer has had no choice of freedom to bargain for more than a lease of one year's duration; (2) the dealer has had no choice to become a purchase and sale vendor, he has had to sign the consignment agreement to become a

lessee; (3) after occupancy at the station he has had no free choice to terminate consignment agreements and become a purchase and sale dealer; he was told that the only paper Union would write was consignment; (4) the dealer has had no free choice to set retail prices of his own judgment because if he did he knew he would lose his business; (5) the dealer has had no free choice in rejecting Union's gasoline deliveries and to take on a purchase and sale agreement with another supplier because if he did he would be violating consignment and he would lose the business.

2. Assuming the Means Used by Union Were Not Coercive, the Retail Dealer Consignment Agreement Was a Guise to Fix Price and Petitioner Was Entitled to Be Free of Its Restrictions Without Fear of Lease Cancellation.

Even assuming a free choice to do business with Union does not include a right to be free of a tie-in and lease cancellation program, the retail dealer consignment agreement itself is unlawful retail price fixing.

That the respondent had not promulgated a true consignment agreement would appear evident from the facts showing that the risks of title were on the dealer. He absorbed price declines; the respondent refused to commit itself to a guaranteed minimum commission. The risk of theft, evaporation and loss were borne by the dealer except as to natural catastrophies. He alone shared the expenses of storage, handling, insurance. The one exception was the property tax. The consignee paid for gasoline when it was

delivered. The commission paid was simply the margin between tank wagon and retail price.

But when the purpose of a consignment agreement is to fix prices and the agreement is used to fix and establish noncompetitive prices between 3000 dealers the program is in restraint of trade. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Agency is not construed when the clear purpose is to control prices of resellers. See *Klaus, Sale, Agency and Price Maintenance: II*, 28 Col. L. Rev. 441, cases collected 443-450.

In *United States v. General Electric Co.*, 272 U.S. 476 (1926) this Court held a true consignment agreement by a patentee with its 21,000 dealers throughout the country was not in restraint of trade. But the very factors provided by General Electric in the consignment agreement were ignored by Union Oil Co. There General Electric assumed all the risks of "price decline" and carried whatever insurance was carried on the stocks of lamps in the hands of the agents and paid whatever taxes were assessed (Id. at p. 483). This is simply not the case with respondent here who requires the dealers to absorb price declines, to pay all the insurance and to pay all taxes except the property tax. This Court held that the General Electric plan was designed to sell to purchasers through agents. Respondent's plan on the other hand was to control prices in a soft price market (Tr. 223-224). Thus in *United States v. Masonite Corp.*, 316 U.S. 265 (1942) this Court held that the federal courts are bound to analyze marketing systems in terms of the

significance of the business practices as restraints of trade. The consignment agreement here is an avowed price-fixing program, and not one to validly transfer risks between dealer and supplier.

II.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE INTERPRETED CONGRESSIONAL PURPOSES IN THE ENACTMENT OF SECTION 4 OF THE CLAYTON ACT AS PROVIDING A STATUTORY CAUSE OF ACTION DESIGNED TO ALLOW RECOVERY TO THOSE WHO EXPERIENCE THE IMPACT OF VIOLATIONS OF PUBLIC LAW AS DETERMINED BY THE CONGRESS AS GUARDIAN OF INTERSTATE TRADE AND COMMERCE.

A. This Court Has Expressly Held That the Conduct of the Plaintiff, Even If in Violation of the Antitrust Laws, Does Not Immunize the Defendant From Liability.

The doctrine of "consent" as used below immunized conduct forbidden by the Congress from those injured by it. This is, it is respectfully urged, beyond the teachings of this Court. This Court has held that the conduct of the plaintiffs, albeit unlawful in violation of the antitrust laws, could not immunize defendants from those they injure. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1950); *Moore v. Mead's Fine Bread Company,* 348 U.S. 115 (1954).

An agreement with an injured plaintiff does not provide a shield to a Section 4 action. Rather Congress has clearly imposed the right and declared the remedy of redress for injuries suffered from violation of the antitrust laws. *Bruce's Juices Co. v. American*

Can Co., 330 U.S. 743 (1947); *Kelly v. Kosuga*, 358 U.S. 516 (1959).

B. The Decision of the Court Below Not Only Immunized the Defendant From Liability, But Erroneously Assumed That the Federal Courts Have No Right or Duty to Prevent Violators From Continuing a Scheme in Restraint of and Monopolization of Interstate Trade and Commerce Upon Suit by an Injured Victim.

1. A Short Term Lease May Not Be Used to Gain Control of 3000 Business Men and be the Instrument to Allow the Ability to Regiment a Marketing System and Dictate Access and Entry to the Market Place.

It is respectfully urged that the federal courts are to utilize all their power under the Sherman Act to uproot all the parts of the illegal scheme brought before them and to deprive the violators of weapons shown to have been used to restrain trade and monopolize trade. 21 Cong. Record 2457, 3140-3150.

The injury to the petitioner arose because of the use of a short-term lease to effectuate control of his price judgments. As such, the courts below should have determined if the leases of Union were being used as a weapon to promote price control on independent dealers. If so, they could have fashioned a new lease based on uprooting the ability of Union to utilize such a weapon. They should have allowed petitioner an action for damages for compensation based on his right to occupy the station for a reasonable period of occupancy, absent respondent's illegal plans. This is consistent with the decisions of this Court. *Eastman Kodak v. Southern Photo Materials Co.*, supra; *Poller v. Columbia Broadcasting Co.*, supra; *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

The failure to strike down the weapons of restraint and monopoly used by the respondent gives it an immunity which increases, it is respectfully urged, its ability to monopolize the distribution and retailing of petroleum products.

III.

THE DECISION OF THE LEARNED COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT HOLDING A SERVICE STATION OPERATOR HAS A CAUSE OF ACTION AGAINST HIS SUPPLIER WHEN IT USES THE WEAPON OF CANCELLATION OF THE LEASE TO EFFECTUATE RESTRAINTS OF TRADE.

The decision of the learned Court below is also in conflict with the decision of the Fourth Circuit in *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied 366 U.S. 963 (1961). It was there held that the attempt to control the dealer's judgments as to purchases of automotive accessory products by pressure, threatened loss of the dealer's lease and final ouster was unlawful and raised a treble damage action. (See remand (D.C. Md., 1962) 207 F. Supp. 856.)

The decision below would further appear inconsistent with the decisions it cites before the Federal Trade Commission. *F.T.C. v. Sun Oil Co.*, 1962 Trade Cases, Para. 15,909; and *Atlantic Refining Co. v. F.T.C.*, 1962 Trade Cases, Para. 15,786. The private action under the antitrust laws aids and implements the governmental enforcement agencies in preserving freedom of trade. These F.T.C. actions would seem to

be brought for the protection of the dealers against coercion by the major oil companies. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

The opinion of the Fourth Circuit shows that the doctrine of "consent" is inapplicable to the private antitrust suit brought by a dealer against the major oil companies for the coercing of his judgments.

The Fourth Circuit stated, 286 F.2d at p. 836:

> ". . . The findings compel the legal conclusion that such an agreement, arrangement or condition existed, and that if a dealer desired to continue selling Sinclair gasoline under the lease and sales agreements, *he had no choice* but to buy, as well, substantial quantities of Goodyear TBA."

At 839:

> ". . . As pointed out above, the findings compel the conclusion that there existed, in fact, an express agreement with this particular plaintiff to buy Goodyear TBA, made after the cancellation of his first lease, in order for the plaintiff to be restored as a gasoline dealer. This case is not within the Colgate doctrine."

These statements would manifestly apply to Mr. Osborn whether or not he was an incoming dealer or one on the station when the changed plans took place. Further, the petitioner here, like Mr. Osborn, was allowed a lease renewal only on condition that he accept the tie-in program (Tr. 278, 475).

The opinion of the Hearing Examiner in *F.T.C v. Sun Oil Co.*, supra, also points out that Sun Oil economically coerced its dealers. The examiner stated, at p. 13:

"The election offered was only in theory and not in reality. Clearly there was no real choice between accepting commission consignment and economic failure. Instead of assisting the dealers as claimed, the program *forced* them to bear part of the costs of the plan to increase Sun's gallonage. Because of the power inherent in Sun as a result of its sales contracts and leases with the dealers, as well as their inability to compete with Sun at its lower prices if they purchased gasoline at the prevailing tankwagon price, the dealers were *economically coerced* into accepting commission consignment." (Emphasis added.)

IV.

THE PETITIONER COULD NOT HAVE HIS RIGHT TO TRIAL BY JURY DENIED IN A SUMMARY JUDGMENT PROCEEDING WHICH DISCLOSES THAT ISSUES OF FACT ARE IN DISPUTE ON THE GROUND USED TO DENY A CAUSE OF ACTION.

The decision below in affirming a judgment in summary judgment by resort to an affirmative defense is in conflict with the decisions of this Court which grant to the private plaintiff a right to a decision on the merits under the Clayton Act and the United States Constitution. *Radovich v. National Football League,* 352 U.S. 445 (1957); *Klor's, Inc., v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Poller v. Columbia Broadcasting Co.,* 368 U.S. 464 (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690 (1962). Certainly the most that may be said as to "consent" if not erroneous, is that as an affirmative defense it raises issues of fact. But such issues are

decided by the triers of fact. Nowhere had petitioner waived any rights to such trial on the merits. Petitioner's position was simply that respondent had violated the Sherman Act to his injury as a matter of law based on the stipulations of respondent and the record in summary judgment. Defendant is not entitled to a summary judgment based on an erroneous concept of "consent" to be victimized as a matter of law. At most the defense would raise fact issues.

V.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE ESTABLISHED STANDARDS IMPOSED BY THIS COURT THAT APPELLATE COURTS ARE NOT TO DECIDE ISSUES OF FACT.

A. The Petitioner Was Deprived of a Fair and Just Review of the Evidence.

1. As a Factual Matter, Petitioner Was Not Given Any Opportunity to Consent to Respondent's Violation of the Antitrust Laws, and He Did Protest to the Respondent That It Was Engaged in Practices Injurious to Him.

The Court below, it is respectfully urged, did not review the record to determine the facts with respect to petitioner's alleged "consent" with all inferences and presumptions in favor of petitioner. As such it was in clear conflict with *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). But the record showed that any consent was coerced by respondent; and that respondent, indeed protested the coercion. He merely wanted to stay in business as a dealer at a beautiful service station in Fresno, California, controlled by Union Oil Com-

pany who wanted its gasolines dispensed there by dealers who assumed all the risks of the enterprise, but who would submit to price and product control.

The facts of coercion and protest are set forth in the Statement of the Case herein at pages 21 to 24 as to petitioner's claim for damages arising from ouster. It is significant here to point that the genesis of the action was petitioner's protest over the consignment agreement program and its effect on him. He did not merely protest, he organized a campaign as best as a dealer in his circumstances could muster to keep the station. He organized a public campaign to show confidence in his business abilities to convince someone, somewhere in the Union Oil Company that it should change its mind and renew the lease and let him remain a dealer. (Tr. 40-43.) Two hundred and thirty customers supported his campaign. (Tr. 39.) Clearly, petitioner was not a consenter, and not one to bring about a lawsuit. Rather he was to be a conspicuous example by respondent to show in the words of Mr. Rath, "it was foolish for me to try to sue them or anything, because I didn't have the money" (Tr. 480).

As to damages caused by the inability to set prices of his own judgment while at the station, it would be sufficient here to point out that the ouster proved the inability to freely set prices without the loss of the business.

It is respectfully submitted that a decision which denies the small dealer and trader the protection of

the Sherman Act against coercive conduct interfering with his ability to sell in accordance with his own judgment, should not be allowed to prevail.

Dated, San Francisco, California,
March 6, 1963.

Respectfully submitted,

MAXWELL KEITH,
Attorney for Petitioner.

(Appendices A, B and C Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD S. SIMPSON, *Appellant,* vs. UNION OIL COMPANY OF CALIFORNIA, *Appellee.*	No. 17,308 OPINION Jan. 2, 1963

Appeal from the United States District Court for the Northern District of California Southern Division

Before: JERTBERG, and DUNIWAY, Circuit Judges, and JAMES M. CARTER, District Judge

CARTER, James M., District Judge

This private antitrust case for damages was decided on motion for summary judgment in favor of appellee, Union Oil Company of California, hereinafter called Union, and against appellant, hereinafter called Simpson. Generally, it raises the issues of (1) interstate commerce; (2) violation of the antitrust laws and liability of Union, and (3) actionable damage suffered by the plaintiff.

We assume for the purpose of this decision, but expressly refrain from deciding, that there were triable issues of price fixing,[1] exclusive dealing,[2] the effect of the McGuire Act,[3] the effect of a

[1]See: *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150.

[2]See: Sec. 3, Clayton Act, 15 U.S.C. Sec. 14;
United States v. Standard Oil Co., (D.C.So.Calif. 1948) 78 F.Supp. 850; affirmed *Standard Oil Co. of Calif. v. United States*, (1949) 337 U.S. 293;
United States v. Richfield Oil Co., (D.C.So.Calif. 1951) 99 F.Supp. 280; affirmed per curiam, *Richfield Oil Co. v. United States*, (1952) 343 U.S. 922.

[3]66 Stat. 632, 15 U.S. Code, Sec. 45(2), amendment of July 14, 1952 to Section 5(a) of the Federal Trade Commission Act.

prior consent decree of June 1959, whether the consignment program was a device or facade,[4] and inter-state commerce.[5] We refrain from deciding these questions as a matter of law or fact because it appears clearly on the record that Simpson suffered no actionable damage.

The Undisputed Facts

The following statement of facts which are apparently not in dispute, are taken largely from the statement of the case in the brief of Union.

Union is a producer, refiner and marketer of gasoline. It owns a long term lease on a parcel of land in Fresno, California, improved with a gasoline service station. On May 23, 1956, by written lease, Simpson subleased the station from Union for a term of one year, subject to termination by Simpson (but not by Union) on 30 days notice. In 1957 Union gave Simpson a new one year lease, ending by its express provisions on May 22, 1958. Concurrently with the first lease, Simpson and Union executed a written Retail Dealer Consignment Agreement, terminable by either party at the end of any year and ceasing, under paragraph Eighth, upon any termination of Simpson's right to occupy the station.

In April 1958, Union notified Simpson that it was terminating the consignment agreement at the end of its year and would not offer him a further lease.

See: *United States v. McKesson & Robbins, Inc.*, (1956) 351 U.S. 305, 310;
Business and Professions Code (Calif.) Sections 16,905, 17,040 and 17,045.

[4]See: *Appalachian Coals Inc. v. United States*, (1933) 288 U.S. 344, 360;
United States v. Yellow Cab Co., (1947) 332 U.S. 218, 227;
Kiefer-Stewart Co. v. Seagram & Sons Inc., (1951) 340 U.S. 211, 215;
Timken Roller Bearing Co. v. United States, (1951) 341 U.S. 593, 598;
United States v. Masonite Corp., (1942) 316 U.S. 265, 278;
United States v. Richfield Oil Corp., (D.C.So.Cal. 1951) 99 F.Supp. 280, 289;
United States v. Standard Oil Co., (D.C.So.Calif. 1948) 78 F.Supp. 850, 859.

[5]The question of interstate commerce was merely touched on at pretrial and was not passed upon by the trial court.

May 21, 1958, the day before the end of his term, Simpson brought this action to enjoin Union from taking possession of its property and from leasing the station to anyone else. On June 3, 1958, the court denied the requested relief. The trial court filed an opinion, *Simpson v. Union Oil Company*, 162 F.Supp. 746, holding that both the lease and the consignment agreement had expired, and that the court could not compel the making of a new lease.

Union then sued Simpson in the state court in Fresno for unlawful detainer of the property and obtained judgment, adjudicating that at all times after May 22, 1958, Union was entitled to possession of the service station. Simpson thereupon surrendered possession.

Union moved to dismiss the federal action. The motion was granted, but leave was given Simpson to amend. An amended complaint was filed seeking damages in lieu of equitable relief. After certain pretrial proceedings, Union moved for summary judgment.

Thereafter Simpson himself moved for summary judgment on the issue of liability. Simpson's motion was denied, and Union's was granted. The trial judge filed a memorandum, reported in 1961 Trade Cases, Para. 69,936 p. 77,693.

Union's consignment method.

Prior to 1955, Union's merchandising method was by sale to retailers for resale by them. Union put its "consignment" program into effect in 1955, as a permanent measure. New dealers were taken on only as "consignees", and as rapidly as possible former dealers were converted to "consignees" or their leases not renewed. By the time Simpson sought to be a lessee, "consignment" was the only way in which Union would deal with new lessees.

Under this "consignment" method of marketing, Union purportedly remained the owner of the gasoline, and the "consignee" as its purported agent, sold Union's gasoline. The dealer received a guaranteed commission from Union. Since Union purportedly owned the gasoline and the dealer was merely its purported agent

to sell, Union determined the price at which the gasoline was to be sold.

The written consignment agreement provided that Union would deliver to Simpson such quantities of its branded gasolines as the parties *might from time to time mutually agree;* that title to all gasoline delivered would remain in Union until sold by Simpson. Simpson agreed that he would sell "Consignor's gasoline" at prices authorized by it and Union agreed that it would pay Simpson a commission, computed pursuant to a stated formula.

Simpson had been a salaried employee for Union for about eight years, his last position being that of retail representative in the Santa Maria district. He was familiar with the "consignment" agreement and method; he was told by Union he might lease an available Union station and decided upon a station in Fresno, California. In May of 1956, he secured his first lease, and by renewal his lease ran to May 23, 1958. Apparently until March of 1958 he complied with the terms of the "consignment" agreement and fixed prices accordingly.

On or about March 1958, competitors lowered the price of regular gasoline from 34.9 to 27.9. Union did not permit him to lower his price to 27.9 but insisted he maintain it at 29.9, 2 cents above competition.

Simpson then proceeded to set his own prices for gasoline and from March 1958 to the end of the lease fixed prices without reference to demands or suggestions of Union. He was told that if he did not comply with Union's suggested prices, his lease would not be renewed. Union stipulated in the trial court that when his lease expired it was not renewed because of his violation of the "consignment" agreement and that it was Union's purpose to lease its stations only to "consignees".

The Amended Complaint

Simpson's amended complaint charged Union with effectuating contracts which unreasonably restrain trade and commerce; and with the intent and an attempt to monopolize the sale of gasoline in violation of the Anti-trust laws. The amended complaint charged price fixing, exclusive dealing and coercion in forcing the consignment program on independent service station operators.

Plaintiff's Claimed Damage

Simpson claimed damage in the sum of $1000 for his inability to establish his own retailing prices during the period from May 1955 to March 1958, and claimed damages in the sum of $150,000 alleging he was "unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interest as lessee to a successor of his own choosing, and was prevented from selling his 'good will' and was prevented from obtaining the fair market value of his business".

THE STATE OF THE RECORD

The record is not an easy one to read. No written pretrial stipulation of facts was entered into nor was any formal pretrial order made. The trial judge however, filed a memorandum which was helpful.

The Record contains transcripts of proceedings at a pretrial conference on April 30, 1959; a further pretrial conference on May 21, 1959; transcript of proceedings on Union's motion for summary judgment on February 11, 1960; transcript of proceedings on Simpson's motion for pretrial summary judgment on September 16, 1960.

At the pretrial conference on May 21, 1959, the Court suggested that Simpson's counsel submit a statement of the case in factual detail. On June 5, 1959, Simpson filed a "Pretrial Statement for Pretrial Ruling" and an affidavit by Keith, attorney for Simpson, setting forth a series of documents. This statement was before the court on the hearings of the motions on February 11, 1960 and September 19, 1960.

The statement contained the charge that there was an exclusive dealing arrangement, and that lessees were in effect required to buy their gasoline supplies exclusively from the defendant. The statement also charged that the purpose of the defendant in instituting the consignment program, was to control the prices at which independent service station dealers could sell their gasoline. However, there was no concession by Union that the pretrial statement was correct.

At these proceedings before the trial court there was considerable discussion about issues and to say the least, plaintiff's con-

tentions vacillated. Defendant's counsel was pursuing the customary practice in antitrust cases of segmenting the case into parts as small and precise as possible and then attempting to demonstrate there was nothing of merit in each particular part or segment.

The result of all this was to create a most unsatisfactory record in which plaintiff on one date may have indicated he was not seriously pressing a particular contention and at a later date we find the contention being made. Accordingly in the briefs, Union seeks to pin issues down, based upon some statement made in the transcript and Simpson in the briefs, attempts to argue the full extent of his claim unbound by statements made during the proceedings.

If agreement as to facts or issues are reached in the discussions of the pretrial conference, the better practice is to reduce them to writing in the form of a pretrial stipulation and order. As the record now stands, it is almost impossible to determine what agreements, if any, were reached at pretrial.

Damages

We proceed to the question of damages which is dispositive of this case.

It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be present only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust laws, but show also the impact of the violations upon him and damage to him resulting from the violations of the antitrust laws.

If Simpson, assuming, solely for this purpose, the illegality of the consignment program, suffered no actionable damage, the judgment for Union must be affirmed.

Plaintiff has predicated his case on two items of damage—

(1) failure to secure a renewal of his lease, with $150,000 damage alleged, and

(2) "plaintiff was unable to fix the prices of his gasoline during the period from May 1955 to March 1958, to his injury and damage in the amount of $1000".

Failure to Secure Renewal of Lease.

As to the first item of damage, the facts are not in dispute. Assuming for argument only that the consignment program is illegal, courts may not fashion a new lease for Simpson. Right or wrong, as far as Union's activities are concerned, Simpson's tenure ended on May 22, 1958.

We agree with Simpson that a cause of action in a private antitrust suit for treble damages is a tort action, *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7 Cir. 1943) 138 F.2d 967 at 970; cert. den. 321 U.S. 792, and is not founded on a contract, and that the fact the contract was terminated, the lease ended and all rights of the plaintiff as lessee in the land came to an end in May 1958, is not an answer to the problem.

Simpson alleges that he was "compelled to accept the one year lease" and "compelled to accept the consignment agreement". His first lease began May 23, 1956, and was renewed for one year to expire on May 22, 1958. He alleges that prior to May of 1955, Union had used a policing method to carry out price fixing. He charges in May 1955 Union created the consignment agreement. He alleges this contract was "forced" on the independent stations by Union.

In determining whether Simpson suffered or could have suffered any damage, it would appear a distinction should be made between the individual, such as Simpson who was entering his first lease with Union in May of 1956 and other individuals who in May of 1956 already were lessees and had been for some time, i.e. already had status as lessees. *Midwest Theatres Co. v. Co-Operative Theatres*, (D.C.E.Mich. 1941) 43 F. Supp. 216 at 223-24.

Simpson knew that by obtaining the lease he would also have to sign the consignment agreement. He had not previously been a lessee. He had freedom of choice to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.

Simpson is therefore not in the position of lessees who had been operating stations under leasesfrom Union and who may or may not have been forced or compelled to sign a consignment agreement as a condition for renewal of their lease. This latter class of individuals had already made an investment in supplies, equipment for their leased stations; had in most cases built up patronage and good will; on the facts in the record might have reasonably anticipated their lease would be renewed from year to year if they performed an adequate job in the service station.

Had Simpson been a member of this class, there might be some merit to his allegations of force and compulsion and his proposed proof of coercion in the acceptance of a renewal lease tied in with the consignment selling program. We do not pass on the question as to these lessees. But Simpson was coming into the leasing business fresh. He had had no former lease agreement.

The law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.

The Restatement on Torts, Sec. 892, states,

> "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct".

Courts of law do not award damages to the plaintiff who through his own action has brought the alleged injury upon himself.

It thus appears that any damage occurring to Simpson was the result of his own free and deliberate choice and he could not

deliberately and knowingly enter into contractual obligations and then and thereafter contend he was injured by the results of his own acts.

We pass no opinion whether, as a factual matter, dealers in the second category here referred to, i.e. with stations, have been compelled, forced or coerced in their dealings with Union; or if this has happened, what are their rights if any. This decision may await another day with a trier of fact to decide that question.

Inability to Set Prices

What we have said as to Simpson's first specification of damage, also applies to his claim of inability to fix prices.

In addition it should be noted that Simpson alleges he was "unable" to fix the price of gasoline from May 1956 to March 1958. The undisputed facts show he did in fact exercise the power or privilege of fixing the prices of gasoline from March 1958 to May 22, 1958. True he did this at the hazard of failing to secure a renewal. The hazard actually eventuated.

The immediate assumption one makes is that he could have pursued this course of action earlier. His action in March 1958 demonstrates he was not "unable" to fix prices on gasoline.

Simpson was apparently content to let the situation rock along until March 1958. Then he acted.

What he could have earned had he fixed prices on the gasoline from May 1956 to March 1958 is conjectural. Damage in an anti-trust case need not be shown to a mathematical certainty. *Karseal v. Richfield*, (9 Cir. 1959) 271 F.2d 709. Possibly proof could have been made. But when his claim is based on an alleged *inability* to change the situation and his own actions show this ability we think his claim fails.

Conclusion

We pass no opinion on the legality of the consignment program.[6] The issue of damages determines this case.

For the reasons stated, the judgment is affirmed.

(Endorsed) Opinion Filed Jan. 2, 1963.

Frank H. Schmid, Clerk.

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[6]Two consignment cases are pending before the F.T.C.

In *F.T.C. v. Sun Oil Co.*, (1962) Trade Cases, Para. 15,909, an examiner found consignment agreements between Sun and its retail dealers were invalid. The examiner found that the agreements were not primarily to aid the dealers financially as contended, but were entered into "to enable Sun to post uniform lower retail prices throughout the area, increase its share of the market, and attempt to reduce the differential between Sun and the private-brand operators to one cent a gallon". Therefore, there was not a bona fide agency.

As a result of unrealistic tank-wagon prices and leasing arrangements, the examiner found that Sun had economically coerced the dealers into accepting the contracts against their will, although an ostensible choice had been given. The element of coercion was cited as the distinguishing factor between the present case and *United States v. General Electric Co.*, (1926) 272 U.S. 476.

In *Atlantic Refining Co. v. F.T.C.*, (1962) Trade Cases, Para. 15,786 an examiner found a consignment agreement between Atlantic and its wholesalers, used in meeting a competitive situation, was valid as following the principles of *United States v. General Electric Co.*, (1926) 272 U.S. 476.

Insufficient evidence of coercion was found to destroy the validity of the agency agreement.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 17,308

Richard S. Simpson,
Appellant,

vs.

Union Oil Company of California,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellant.

It is further ordered and adjudged that the appellee recover against the appellant for its costs herein and have execution therefor.

Filed and entered January 2, 1963.

Appendix C

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U. S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the Court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment

or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.